

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:NER:NED:BOS:TL-N-4477-99

MAKnospe

date: **SEP 02 1999**

to: District Director, New England District
Attn: Steve Winston, PPQMB

from: District Counsel, New England District, Boston

subject: [REDACTED]

TIN: [REDACTED]

Taxable Years Ending: February 28, [REDACTED] and February 28, [REDACTED]

DISCLOSURE STATEMENT

This advice constitutes return information subject to I.R.C. § 6103. This advice contains confidential information subject to attorney-client and deliberative process privileges and if prepared in contemplation of litigation, subject to the attorney work product privilege. Accordingly, the Examination or Appeals recipient of this document may provide it only to those persons whose official tax administration duties with respect to this case require such disclosure. In no event may this document be provided to Examination, Appeals, or other persons beyond those specifically indicated in this statement. This advice may not be disclosed to taxpayers or their representatives.

This advice is not binding on Examination or Appeals and is not a final case determination. Such advice is advisory and does not resolve Service position on an issue or provide the basis for closing a case. The determination of the Service in the case is to be made through the exercise of the independent judgment of the office with jurisdiction over the case.

This refers to your memorandum dated July 14, 1999 concerning the above-referenced taxpayer. You have requested our advice with respect to the statute of limitations for assessment of deficiencies in income tax reflected on a notice of deficiency resulting from the elimination of NOL carrybacks to taxable years [REDACTED] and [REDACTED] due to adjustments to income in the [REDACTED] loss year. Our advice is based solely upon the facts contained in your memorandum.

ISSUE

Whether the six-year statute of limitations under I.R.C. § 6501(e) as applied to the loss year, [REDACTED], holds open the statute of limitations under I.R.C. § 6501(h) for the carryback years, [REDACTED] and [REDACTED], so that deficiencies in income tax generated in [REDACTED] and [REDACTED] by the elimination of NOL carrybacks from [REDACTED], and reflected on a notice of deficiency, can be properly assessed within the six year period.

CONCLUSION

Deficiencies asserted on the notice of deficiency with respect to the [REDACTED] and [REDACTED] carryback years may be assessed under the provisions of I.R.C. §§ 6501(e), 6501(h) and 6503(a), and we recommend that those assessments be made without further delay.

FACTS

The federal income tax return (Form 1120) filed by [REDACTED] for the taxable year ending February 28, [REDACTED] reflected a net operating loss in that year which taxpayer carried forward to [REDACTED] and back to taxable years [REDACTED], [REDACTED] and [REDACTED]. An examination found that [REDACTED] had omitted gross income on its [REDACTED] return that resulted in a deficiency which eliminated the NOL in that year, along with the carryover to [REDACTED] and the carrybacks to [REDACTED], [REDACTED] and [REDACTED]. During the audit, pursuant to I.R.C. § 6501(c)(4), a Consent to Extend the Time to Assess Tax (Form 872) was executed extending the statute of limitations for assessment for taxable years ending February 28, [REDACTED] and February 28, [REDACTED] to June 30, [REDACTED]. A notice of deficiency was issued to the taxpayer on [REDACTED] reflecting deficiencies in income tax for the taxable years [REDACTED], [REDACTED], [REDACTED] and [REDACTED] in the amounts of \$[REDACTED], \$[REDACTED], \$[REDACTED], \$[REDACTED], and \$[REDACTED], respectively. Additions to tax were asserted with respect to taxable years [REDACTED] and [REDACTED] under I.R.C. § 6662(a) for substantial understatements and under I.R.C. § 6651(a)(1) in [REDACTED] for delinquency. [REDACTED] failed to file a petition with the Tax Court and on [REDACTED] assessments were made with respect to taxable years [REDACTED], [REDACTED] and [REDACTED] in the amounts reflected on the notice. Due to administrative error, no assessment was made with respect to taxable year [REDACTED] nor [REDACTED].

LAW AND ANALYSIS

Under the general rule for the assessment of deficiencies a tax must be assessed within three years after the return is filed, whether filed on or after the due date. I.R.C. § 6501(a). Section 6501(h) sets forth an exception to the general rule by providing an extended period in the case of a deficiency attributable to the application to a taxpayer of a net operating loss carryback. Such a deficiency may be assessed at any time before the expiration of the limitations period for assessing a deficiency for the taxable year of the loss. I.R.C. § 6501(h); Treas. Reg. § 301.6501(h)-1; Smith v. Commissioner, 925 F. 2d 250, 253 (8th Cir. 1991); Schneer v Commissioner, T.C. Memo 1993-372. The extended assessment period applies to deficiencies assessed by a notice of deficiency and to assessments made using the summary assessment procedure under I.R.C. § 6213(b)(3).

The Internal Revenue Manual, Handbook No. 8.1.1, Appeals⁻⁻⁻
Return Processing and Control, Handbook, Sub-Section 3(15)1, AIMS
and uniSTAR - Updating Statute Dates AIMS - District Office and
The Notice of Deficiency, provides general guidance for updating statute dates. Subsection (f) provides the following guidance with respect to statute updating following a defaulted statutory notice of deficiency: "Enter a date 150 days (210 days for foreign country residents) from what the normal or extended statute date was before the statutory notice of issued. See note below." The note provides the following additional information:

If it appears that a statute period may expire right away or if it appears it's already expired, immediately deliver the case to the appeals officer or office chief for computation of the statute date using "Tack-on" procedures. "Tack-on" is the number of days remaining on the normal statute date when the statutory notice was issued. (Issue date PLUS number of days from issue date to the normal or extended statute date before the statutory notice was issued.)

In the instant case, the transcripts of account for the taxable years [REDACTED] and [REDACTED] each reflect updating first to [REDACTED] the extension date, and then to [REDACTED], a date 244 days after the mailing of the notice of deficiency, comprising 150 days plus the tack-on period of an additional 94 days. Deficiencies were assessed with respect to taxable years [REDACTED] and [REDACTED] on [REDACTED], within the updated statutory period. The transcripts of account for taxable years [REDACTED] and [REDACTED] also reflect updated statute dates of [REDACTED] however, no assessments were made with respect to those years prior to [REDACTED].

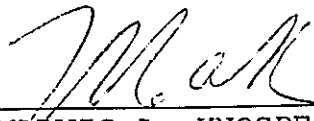
It is our understanding that the adjustment on the notice of deficiency for the taxable year [REDACTED] reflects a twenty-five percent omission of income which we assume, for purposes of this discussion, meets the definition of a substantial understatement of tax set forth in I.R.C. § 6501(e). The statute of limitations was not updated to reflect the six-year statute provided by a twenty-five percent omission of income with respect to the loss year, and the initial processing of the case was handled based upon the statute extensions only. According to Item 14(b) of The Internal Revenue Manual, Handbook No. 8.1.1, Appeals Return Processing and Control Handbook, Exhibit 400-1, Form 5403, appeals Closing Record (Instructions), dealing with statute dates, "[w]hen the basic period is extended by special code provisions such as 25% omission . . . you should enter the extended statute date . . . and the appropriate code section which determined this date." Under section 6501(e) the statute of limitations for the taxable year [REDACTED] expires no sooner than [REDACTED], six years after the [REDACTED] due date for filing the return; the statute would be further extended by a later filing date and by the provisions of section 6503(a).

Based on the foregoing, we believe that the statute of limitations for the [REDACTED] loss year may be updated to reflect the six-year statute provided under section 6501(e), and assessments made with respect to the [REDACTED] and [REDACTED] carryback years, under the provisions of I.R.C. §§ 6501(e), 6501(h) and 6503(a). We recommend that the assessments be made immediately. We do not believe that the issuance of a second notice of deficiency is appropriate. See GCM 33366 (Nov. 3, 1966).

Since there appears to be no further assistance to be provided by our office we have marked our file closed. Your administrative files are returned herewith; we note that the file does not contain the [REDACTED] return, which should be obtained and associated with the file.

GERALD J. O'TOOLE
District Counsel

By: _____


MARVIS A. KNOSPE
Attorney

Attachment: As stated